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# E. L. Murphy Trucking Company v. Climate Control, Inc., v. American Standard, Inc. : Brief of Respondent

Utah Supreme Court


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IN THE

# SUPREME COURT

OF THE

# STATE OF UTAH

E. L. MURPHY TRUCKING COMPANY.

*Plaintiff-Appellant,*

vs.

CLIMATE CONTROL, INC.,

*Defendant-Respondent,*

vs.

AMERICAN STANDARD, INC.,

*Co-Defendant - Co-Respondent.*

Case No. 13555

## BRIEF OF RESPONDENTS

Appeal from a Summary Judgment of the Third Judicial District for Salt Lake County, Honorable Stewart M. Hanson, Judge



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## BRIEF OF RESPONDENTS

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## NATURE OF THE CASE

This is an action by an interstate motor carrier to recover freight charges from the manufacturer and from the recipient of certain goods transported by the carrier.

## DISPOSITION IN LOWER COURT

On cross-motions for summary judgment, the District Court for the Third Judicial District, Stewart M. Hanson, granted the motions for summary judgment of respondent

Climate Control, Inc., and of co-respondent American Standard, Inc., and denied appellant's motion for summary judgment.

## RELIEF SOUGHT ON APPEAL

Respondents ask this Court to affirm the order and judgment of the court below.

## STATEMENT OF FACTS

Respondent Climate Control, Inc. and co-respondent American Standard, Inc. accept appellant's statement of facts of the case except for the statement in paragraph 11 on page 4 of appellant's brief, to the effect that "E. L. Murphy Trucking Company virtually had daily communications with the East Coast Drayage Company from the date of billing including personal visits . . ." While this assertion seems immaterial to the issues presented by the appeal, these assertions are nowhere supported in the record. In addition, appellant's statement of facts fails to state that unequivocal demand for payment was not made by appellant upon co-respondent American Standard, Inc. until July 11, 1972 (R-100), and fails to state that demand for payment was not made by appellant upon respondent Climate Control until September 28, 1972 (R-104).

In the interest of clarity, however, these parties present the following summary of the transactions from which this lawsuit arises. In late 1971, Climate Control ordered some large air conditioning units from American Stan-

dard's predecessor in interest in this matter. The contract under which these units were sold prescribed that American Standard would prepay the freight charges necessary to ship the units from Carteret, New Jersey, to Salt Lake City, Utah. American Standard contracted with a New Jersey company called B & M Trading to have the air conditioning units shipped to Salt Lake. B & M Trading in turn contracted with another New Jersey company, East Coast Drayage Company, to ship the units. Finally, East Coast Drayage Company contracted with plaintiff, E. L. Murphy Trucking Company, to transport the air conditioning units to Salt Lake City. Murphy Trucking Company accepted the air conditioning units for shipment on November 5, 1971, and prepared four bills of lading, one of which was applicable to each of the four truckloads to air conditioning equipment in question. As indicated in appellant's Statement of Facts, one of these documents stated that the freight charges were "prepaid," one indicated that the freight charges were "to be prepaid," and two of the bills omitted any notation about prepayment of freight charges. Each of Murphy Trucking's four bills of lading, however, state: "Bill To: East Coast Drayage Corporation, 901 East Linden Ave., Linden, New Jersey 07036" (R-111, -113, -115, -117). It is undisputed that all of the bills of lading prepared by American Standard stated that the freight charges were "to be prepaid" (R-46-57). Plaintiff transported the four truckloads of air conditioning units to Salt Lake City between about November 16 and November 19, 1971, and delivered them to Climate Control with Murphy Trucking's bills of lad-

ing referred to above, and without making any demand for payment upon Climate Control or American Standard.

Appellant billed East Coast Drayage Company for the shipping charges on November 17 and 18, 1971. Over the next several months, Murphy Trucking attempted to collect its freight charges from East Coast Drayage (R-83-90). Almost four months after delivery of the shipment, Murphy Trucking Company's attorneys discovered that East Coast Drayage Company was apparently in financial difficulty and was unlikely to be able to pay the freight charges in question (R-91). Plaintiff first made demand for payment of these charges on American Standard on July 11, 1972, almost six months after delivering the goods (R-100) and first made demand on Climate Control on September 28, 1972, some nine months after delivering the goods in question (R-104).

In the meantime, American Standard had made payment for these shipping charges to B & M Trading Company on November 9, 1971, shortly after the goods were picked up (R-40), and Climate Control had completed payment of the price of the air conditioning units and freight charges to American Standard on January 14, 1972 (R-124).

## ARGUMENT

### POINT I.

### APPELLANT IS ESTOPPED FROM ASSERTING DOUBLE LIABILITY AGAINST

## EITHER AMERICAN STANDARD OR CLIMATE CONTROL.

The issue presented by this appeal is whether E. L. Murphy Trucking Company is estopped from claiming that either Climate Control or American Standard, each having once paid the freight charges at issue in this case, is liable to pay them a second time to appellant.

Climate Control and American Standard contend that this case is governed by the holdings of *Consolidated Freightways Corporation* v. *Admiral Corporation*, 442 F. 2d 56 (7th Cir. 1971), and *Missouri Pacific Railroad Company* v. *National Milling Company*, 409 F. 2d 882 (3rd Cir. 1969), and that those cases hold that appellant is estopped from asserting its claim of double liability against either Climate Control or American Standard.

In the *Admiral* case, some electrical components imported from Japan had been shipped from their arrival port on the west coast to Admiral's plants in Illinois under a contract in which a west coast shipper arranged customs clearance for the imported goods and then selected a motor carrier to transport the goods inland. The shipper agreed to prepay the freight charges in question. The plaintiff carrier prepared bills of lading which stated that Admiral was the consignee, and that *the shipper was the party to be billed* (emphasis added). The bills of lading also stated that the freight charges had been prepaid, or were to be prepaid. The carrier delivered the goods to the consignee without making demand for pay-

ment, without reserving any right to claim payment from the consignee or the manufacturer in the event it was unable to collect from the shipper, and without notifying the consignee that it had not been paid by the shipper. Following delivery of the goods, Admiral, as consignee, paid the freight charges to the shipper. The carrier tried in turn to collect the prepaid freight charges from the shipper, but was unable to do so because the shipper had gone out of business. The Seventh Circuit held that because of the representations it had made on its bills of lading, and because of its failure to notify the consignee of the true nature of its credit transactions with the shipper, the carrier was estopped from asserting its claim that the consignee was liable to pay the freight charges in question a second time. In the *National Milling* case the carrier had incorrectly indicated on the bills of lading which it delivered with the goods in question that the freight charges at issue had been paid by the shipper, and had in effect directed the consignee to reimburse the shipper. The Third Circuit also held that the carrier was estopped from claiming double liability against the consignee.

Appellant claims that two of the facts of this case are sufficient to distinguish the *National Milling* and *Admiral* cases. The first such fact relied upon by appellant is the fact that two of the four bills of lading delivered with this shipment were not marked "prepaid" or "to be prepaid." The second fact relied upon by appellant is the fact that the affidavit of Mr. John Dillon states that payment by

Climate Control to American Standard for the shipping charges in question was based upon the American Standard's bills of lading which recited the fact that all freight charges involved in this transaction were to be prepaid (R-46-57), and upon the assurance that the goods specified in the invoices had in fact been received by Climate Control, rather than upon the invoices of E. L. Murphy Trucking Company (R-19-20).

The omission by appellant of the notation "prepaid" or "to be prepaid" from two of its own bills of lading does not distinguish the cases relied upon by respondents. The *Admiral* opinion states explicitly that the bills of lading at issue there showed two things: (1) The shipper was designated as the party to be billed rather than the consignee; (2) The bills were marked "prepaid" or "to be prepaid." The opinion relies principally on the fact that the bills showed that the shipper was the party to be billed, and only secondarily on whether they contained the "prepaid" or "to be prepaid" notation. In a footnote to the opinion, the question of whether the notations regarding prepayment indicated that payment had actually been made by the shipper was treated as immaterial (442 F. 2d at 58 n. 1). The Court was apparently concerned only that the "prepaid" or "to be prepaid" notations were consistent with the decisive fact about the bills — the statement that the carrier intended to look to the shipper for payment. Appellant's argument overlooks the fact that each of appellant's bills of lading which was presented to Climate Control affirmatively represented that

appellant also looked to the shipper for payment, and expected no payment from Climate Control in return for the delivery of the goods. The decision in *National Milling* also hinged on the fact that the bills in question, construed in the light of the transaction in question, "in effect directed the consignee to reimburse the shipper" (409 F. 2d at 883).

Neither does the affidavit of John Dillon distinguish this case from *National Milling* and *Admiral.* The issue of defendant's reliance on plaintiff's representations was not raised in *National Milling.* The specific argument which appellant makes here was presented and rejected in *Admiral.* Plaintiff there argued that the consignee could not assert estoppel because it had not relied upon the representations of prepayment in making its reimbursement to the shipper. The Court rejected that argument and ruled that in the absence of evidence that the consignee had actual knowledge of the fact that the transaction was not as the carrier's bills represented it to be, the carrier would be estopped from seeking a second payment from the consignee. Respondents contend that were this Court to accept the argument presented by appellant, a carrier could frustrate the intentions of the parties to any prepaid freight transaction by simply omitting the "prepaid" notation from its own bills of lading. The carrier could then accept the benefits of its participation in the transaction in the event the freight charges were promptly paid, but could avoid the burden of looking to the shipper rather than to the consignee for payment in

the event the shipper proved unable to pay. Such a result would be contrary to the equitable principle, applicable to *estoppel in pais*, that a party may not retain the benefits of an agreement while repudiating its burden. *Contractors Dump Truck Service, Inc.* v. *Gregg Const. Co.*, 46 Cal. Rptr. 738 (Cal. App. 1965); *Holt* v. *Ravani*, 34 Cal. Rptr. 417 (Cal. App. 1963).

Respondents further contend that appellant's argument that detrimental reliance must be shown to have been based upon the specific representation made by appellant regarding prepayment is contrary to the rule that where a party has ratified a contract, he will be estopped to assert a proposition contrary to that contract regardless of prejudice to the other party. The party who has ratified a contract is not bound by the terms of the agreement he ratified because the other party has been prejudiced thereby. He is bound by the agreement because he intended to be bound. 28 Am. Jur. 2d Estoppel and Waiver § 31. It is undisputed here that appellant deliberately agreed to participate in the prepaid freight agreement, and it is undisputed that appellant had actual knowledge at all material times that it was participating in a prepaid freight transaction.

Respondents further contend that this portion of appellant's agreement overlooks the fact that estoppel may be based upon silence despite a duty to speak.

The applicable Interstate Commerce Commission regulations imposed upon appellant the responsibility for

deciding whether to accept the goods in question from the shipper without first receiving payment. These regulations state: "upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor vehicle may relinquish possession of freight in advance of the payment of the delivery charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called shippers, for a period of seven days excluding Saturdays, Sundays, and legal holidays." 49 C. F. R. § 1322.1 (1972). Appellant is in effect asking this Court to amend this federal regulation so as to relieve appellant from the obligation to assume responsibility for the selection of those persons or businesses to whom it extends credit. Murphy Trucking, by its election to participate in the prepaid freight transaction in question, became bound by the terms of the agreement it had ratified between American Standard and Climate Control. American Standard and Climate control were entitled to assume that appellant would fulfill its obligations under the I. C. C. regulations quoted above. In the event appellant intended to assert any claim contrary to those expectations which were the logical consequence of its agreement with American Standard and Climate Control, the *Admiral* case requires that the carrier communicate that contrary intention or be estopped from asserting once it becomes clear that the shipper turned out to be a bad credit risk.

Those inferences reasonably to be drawn from all of

the facts and circumstances of this case indicate that the single statement relied on by appellant from the affidavit of Mr. John Dillon (Brief of Appellant at 5) does not negate the conclusion that Climate Control relied upon the assertions and the inferences of appellant in making payment to American Standard for the shipping charges in question. Read in its entirety and construed in the light of the nature of the transaction involved, the affidavit of Mr. John Dillon indicates that in making payment to American Standard, Climate Control was relying upon the belief that those expectations reasonably to be inferred from their contract with American Standard had been fully consummated. Murphy Trucking affirmatively represented, by stating on all of the bills of lading that it was looking to East Coast Drayage for payment, by verifying on two of the bills of lading that it knew it was participating in a freight prepaid transaction, and by delivering the air conditioning units without communicating any demand for payment, that Murphy Trucking had ratified the transaction and was content to abide by those expectations which Climate Control and American Standard had established by their agreement governing the freight charges.

Similarly, appellant's claim that, in making payment to American Standard, Climate Control was only doing something it was legally obligated to do is without merit. The *Admiral* case specifically states that the consignee has no duty to expose himself to the risk of double liability (442 F. 2d at 59). The case of *Northern State Con-*

*struction Company* v. *Robbins*, 457 P. 2d 187 (Wash. 1969), cited by appellant, involves promissory estoppel, a substitute for consideration, and is not in point here.

## POINT II.

## APPELLANT HAS SHOWN NO BASIS IN LAW FOR ITS CLAIM OF LIABILITY AGAINST EITHER AMERICAN STANDARD OR CLIMATE CONTROL.

The line of cases, including *Pittsburgh, Cincinnati, Chicago & St. Louis Railroad* v. *Fink*, 259 U. S. 577, 40 S. Ct. 27 (1919), and *Louisville & N. R. R.* v. *Central Iron and Coal Co.*, 265 U. S. 59, 44 S. Ct. 441 (1924), cited in appellant's brief as standing for the proposition that the consignee should be presumed liable for payment of freight charges absent a showing that he is an agent with no beneficial interest in the shipped property have no application at all to the facts of this case. The *Admiral* and *National Milling* cases and *Consolidated Freightways Corp.* v. *Eddy*, 513 P. 2d 1161 (Ore. 1973), relied on by appellant, all clearly distinguish the *Fink* and *Central Iron* line of cases. These cases, referred to as "under charge" cases in the *Admiral* (442 F. 2d at 62) and *Eddy* (513 P. 2d at 1164) opinions, deal with whether a consignee could assert that a public carrier was estopped from collecting the full rate prescribed under its ICC tariffs for the shipment in question. None of these cases

raised the issue of whether or not the consignee was liable. In each of these cases it was conceded that the consignee owed some liability to the carrier. The only issue presented was whether the consignee could assert that the carrier was estopped from recovering the full tariff rate by virtue of the fact that the carrier had in some way represented that it would accept a lesser rate. The rationale of these cases, as noted in the *Eddy* opinion (513 P. 2d at 1165) is simply that a consignee or a shipper are conclusively presumed to know the tariff rate and will therefore not be permitted to assert estoppel against the carrier where the carrier has represented that it will accept payment in a lesser amount as satisfaction of its freight charges. Estoppel might be equitable in the "undercharge" cases, but its application could frustrate the prevention of rebates which is the underlying purpose of the ICC statutes relied on by appellant.

The issue presented by this appeal concerns not the amount of the freight charges, but whether appellant can assert any claim of liability against respondents. A careful reading of the *Admiral, National Milling*, and *Eddy* cases shows that those cases have established the proposition that the determination of the question presented here — whether Murphy Trucking can assert any claim for double payment against either Climate Control or American Standard is simply not governed by the ICC statutes cited in appellant's brief (513 P. 2d at 1165). The *Eddy* case, relied upon by appellant in its brief, says:

> When the question is not the amount of the freight charge, but merely which party is to be responsible for paying that amount, the possibility of discrimination in rates is not involved. The purpose of the legislation is not thwarted by holding that a carrier may be estopped to collect its freight charges from the consignee, and must look solely to the shipper (513 P. 2d at 1165).

It necessarily follows that the contention expressed in Appellant's brief to the effect that under the facts of this case "both the consignor and the consignee are both contractually and or statutorily liable for all goods transported by a carrier". (Brief of Appellant at 14) is simply wrong under the holdings of the very cases cited by appellant. Respondents contend that the single proposition which it is most important that this Court see in those cases cited by both respondents and appellant is the fact that the sole issue presented by this appeal—whether any liability exists to the appellant from either of the respondents — has not been dealt with at all in the ICC statutes or regulations, but has been left to be determined by contractual agreement by the parties to each individual shipping transaction. This proposition is clearly stated in the *Admiral* opinion:

> The undercharge cases are thus consistent with and, indeed, support our conclusion that Section 223 was not intended to fasten a rigid liability upon a consignee. Congress left the initial

> determination of a party's liability for freight charges to express contractual agreement or implication of law. So long as payment of the full tariff charges may be demanded from some party, the anti-discrimination policy of the Section is satisfied. Congress did not undertake to settle all issues of collection with the enactment of Section 223. Nor did Congress intend to fashion a sword to insure collection in every instance and a shield to insulate the carrier from the legal consequences of otherwise negligent or inequitable conduct. (442 F. 2d at 62, citations omitted.)

Of all of the cases cited in appellant's brief only three, the *Admiral*, *National Milling*, and *Eddy* cases, deal with the specific issue presented here — in a prepaid freight transaction, what acts or omissions on the part of the carrier will, as a matter of law, estop the carrier from attempting to collect double payment of the freight charges in question from the originating shipper or the consignee? Respondents contend that the entire argument presented by appellant is fatally flawed in that it fails to recognize that these cases require that a prepaid freight transaction be treated differently from the normal shipping transaction. When viewed in the light of the underlying purpose and policies of the ICC statutes and regulations, the distinction thus recognized between a shipment in which freight charges have been prepaid and one in which they have not been prepaid makes good sense. The carrier's normal recourse against a non-paying

consignee would be to refuse to deliver the goods shipped. In such a situation, it makes good sense for the carrier to be able to deliver the goods without relinquishing its claim of liability against the parties to the sale of the goods. These parties have had the benefit of the carrier's services, and have not paid any money for those services. In the case of a shipment involving prepaid freight, the parties to the contract for the sale and shipment of the goods have themselves included in their contract a provision which accrues to the benefit of the carrier. In a prepaid freight situation, the parties to this original contract have performed an affirmative act which should be expected to have the effect of increasing the carrier's assurance that it will receive payment for its services, and of accelerating the time at which it will receive such payment. This being true, it makes eminent good sense to require that in the event the carrier wishes to assert a claim of liability which would have the effect of disrupting the expectations thus established between the parties to the original contract for the sale of the goods, which the carrier has ratified, the carrier must assume the burden of clearly and promptly communicating his contrary intention to any of the other parties as against whom he wishes to preserve his right to claim liability. Respondents content that this, and no less, is what the *Admiral*, and *National Milling* cases require of a carrier in order to preserve any right to later assert a claim of double liability such as is presented here.

Respondents further contend that the *Admiral, National Milling* and *Eddy* cases stand for the proposition that estopping the carrier from subjecting a consignee, or a party in American Standard's position, to possible double liability for freight charges which it has already paid does not present a situation in which the equitable principles of estoppel can be applied to frustrate in any way the statutory purposes of the ICC acts and regulations. While it is true that the ICC regulation quoted above has been held not to be for the benefit of the consignee, it is equally true that the ICC statutes and regulations do not impose any presumption of double liability for the benefit of the carrier. As the Seventh Circuit stated in the *Admiral* case:

> Requiring double payment of the charge by [the consignee] would not further the statutory policy of preventing "unjust discrimination or undue preference" . . . Permitting recovery in this case would serve only to reward the carrier for its unlawful as well as inequitable conduct. We decline to turn Section 223 inside out to achieve that anomalous result (442 F. 2d at 63).

The *Admiral, National Milling* and *Eddy* cases should be viewed as applying all of the equitable principles of estoppel to a specific fact situation — a prepaid freight transaction. The application of those equitable principles in the *Admiral*, and *National Milling* cases is consistent with the Utah Supreme Court cases of *Farmers and Mer-*

*chants Bank* v. *Universal C. I. T. Credit Corporation*, 4 Utah 2d 155, 289 P. 2d 1045 (1955); *Green* v. *Garn*, 11 Utah 2d 375, 359 P. 2d 1050 (1961), cited by appellant in its brief. Appellant seems to argue in its brief that in order to support the lower court's ruling this court must first find the *Admiral* and *National Milling* cases to be in point and, in addition, find that the facts of this case match the facts of the Utah cases cited above. Respondents contend that the *Admiral* and *National Milling* cases are well-reasoned applications of the equitable principles of estoppel to the specific fact situation presented here, and that the argument presented by appellant runs contrary to the proposition, acknowledged by appellant in its brief, that estoppel can not be subjected to fixed and settled rules having universal application (Brief of Appellant at 10).

Of all of the cases relied on by appellant, only the *Eddy* case deals with a prepaid freight transaction, and that case is distinguishable from the instant facts. In *Eddy*, the court held that because the defendant consignee had failed to plead that he had relied on plaintiff's actions, and had then subsequently failed to amend his answer to plead the defense of estoppel after his first demurrer had been held insufficient, the plaintiff would not be estopped to assert its claim of liability against defendant. In the instant case appellant acknowledges that Climate Control has pled the defense of estoppel which the defendant had failed to plead in *Eddy* (Brief of

Appellant at 6). American Standard pled affirmatively that appellant is estopped because of its actions and because American Standard acted as it did in reliance upon appellant's representations (R-59-60). In addition, in the *Eddy* case there was

> . . . no allegation that the bill of lading contained *any notation* that the freight had been prepaid and no allegation that defendant was mislead into assuming that the freight had been prepaid by *any other representations or conduct* of the carrier (513 P. 2d at 1166, emphasis added).

The fact that appellant here affirmatively represented on its bills of lading that it would look to East Coast Drayage for payment of the freight charges, and the fact that the bills of lading did contain some notation that the freight had been prepaid, distinguish the *Eddy* case.

## CONCLUSION

Appellant's affirmative representations that it would look to the shipper for payment of the freight charges in question, together with its incomplete notations of prepayment on the bills of lading, its delivery of goods without demand for payment, its failure to communicate to either American Standard or Climate Control that it had not in fact received payment from the shipper, and its delay in asserting any claim for payment of the freight charges until after both American Standard and Climate

Control had fully paid the freight charges in question, bring this case squarely within the holdings of the *Admiral* and *National Milling* cases. Appellant ratified the agreement of American Standard and Climate Control, and they were entitled to rely on their expectations that delivery of the goods in question together with bills of lading which affirmed Appellant's ratification of the prepaid freight arrangement would mean that the transaction had been fully consummated and that they were safe from exposure to double liability if they completed payment in accordance with the terms of their agreement. Appellant had the burden of placing these parties on notice of any claims it intended to assert against them before they made payment of the freight charges, thus changing their position to their detriment. Appellant failed to give such notification, and, in fact, affirmatively ratified the prepaid transaction. Under these circumstances, appellant may not now seek to impose double liability on either of respondents, and the lower court's ruling was, accordingly, correct.

The "over charge" cases cited by Appellant provide no basis for imposing double liability on either American Standard or Climate Control. While it is regrettable that the freight charges which were paid in this case by both American Standard and Climate Control did not reach appellant to compensate it for its services, both the ICC regulations and the applicable case law place the burden

of assuming that risk upon appellant. That burden cannot, as a matter of law, be transferred to either American Standard or Climate Control.

Respectfully submitted,

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